

MINUTES

**SUPREME COURT’S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, November 5, 2014
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch
Alison Adams-Perlac, Staff
Professor Jensie Anderson
Jennifer Andrus
Sandi Johnson (via telephone)
Linda Jones (via telephone)
Judge Brendon McCullagh
Jesse Nix
Thomas Pedersen, Intern
Judge Michael Westfall (remotely via VIAC)
Scott Young

EXCUSED

Judge Denise Lindberg, Chair
Mark Field
Karen Klucznik
John West

1. Welcome and Approval of Minutes

Judge James Blanch

Judge Blanch welcomed everyone to the meeting.
*Professor Andrus moved to approve the minutes from the October 1 meeting as amended.
Judge McCullagh seconded the motion and it passed unanimously.
Judge McCullagh moved to approve the minutes from the September 1 meeting. Ms.
Johnson seconded the motion and it passed unanimously.*

**2. Update on Rule 1-205 and 3-418 of the Utah Judicial Code
of Judicial Administration**

Committee

Ms. Adams-Perlac reported that the Judicial Council passed a change to Rule 1-205 to make the committee a standing committee of the judicial council. She stated that if any member is interested in leaving the committee, now is a good time to submit resignations. Judge Blanch asked if any committee member had a comment on the rule change.

Judge Blanch asked the committee how to proceed with publishing rules for feedback from members of the bar. Ms. Adams-Perlac suggested leaving a publishing requirement out of the rule because it may have to go before the judicial council. She stated that jury instructions

have never had to go before a formal body for review. She stated that there was discussion about creating a website where bar membership could comment on the proposed jury instructions. She stated that she would be meeting with the staff of the civil jury instructions and suggested that our publication process be similar to their process. She stated that the formality of receiving comment from the bar is not required because jury instructions are not rule changes. She stated that this lack of formality would give the committee flexibility when creating model jury instructions.

She stated that the judicial council would probably not want to review the instructions created by the committee. Ms. Jones asked if the last sentence of rule 3-418, which states, “A model instruction will not be published for comment before publication on the Utah State Court website,” is important. Ms. Adams-Perlac stated that rule 3-418 is a proposed rule. She stated that she would recommend removing that sentence.

Judge Blanch asked Ms. Adams-Perlac if the committee should take action on this. She stated that she did not think it was necessary. Judge McCullaugh stated that the rule made sense. Ms. Adams-Perlac stated that rule 3-418 replaced the letter by Justice Durham that gave direction to jury instruction committees. She stated that the policy and planning committee wanted feedback from the committee. She stated that the prior proposal gave instructions to judges, but the policy and planning committee stated that it was advisable because judges handle jury instructions differently. Ms. Adams-Perlac asked the committee if anyone had a comment.

Ms. Jones suggested removing the last sentence from 3-418 to see how it works. Ms. Adams-Perlac says the policy and planning committee would be amenable to the committee’s recommendation because of this committee’s experience.

Judge McCullaugh moves to recommend to the policy and planning committee that the last sentence of proposed rule 3-418 be stricken. Ms. Jones seconded the motion and it passed unanimously.

3. CR 1622 Sexual Offense Prior Conviction Committee

Judge Blanch asked for discussion on CR1622. Ms. Adams-Perlac stated that she did research on whether a prior conviction in another state amounted to the same offense in Utah. She stated that there is not a definitive answer. She suggests treating it as a legal question. Judge Blanch agreed. Judge Westfall sought clarification to whether the committee thought a bifurcated hearing would be necessary. Judge Blanch stated that the question is whether the offense committed in the other state is sufficiently similar to qualify as a prior grievous offense in Utah. Judge McCullaugh clarified that the prosecution would be entitled to a jury instruction that stated that the conviction in the other state would quality as a prior grievous offense in Utah.

Judge Blanch stated that the question is, “who makes the comparison?” He asked whether the jury decides or if the judge makes the determination and instructs the jury. Judge McCullaugh stated that a jury determines the meaning of a “dangerous weapon” is and this is a fact for the jury to decide. Judge Blanch stated that a dangerous weapon analysis is fact based, while a previous offense is more of a matter of law for a judge to consider. Judge McCullaugh stated that we should leave it to trial courts to determine this question because there is not a final answer and the committee should not make the decision.

Ms. Jones asked what the instruction would look like if “grievous sexual offense” was a factual question. Judge Blanch stated that it should say that a grievous sexual offense has elements, provide the statute to the jury, and ask the jury to decide whether the statute of the

other state matches the elements of a grievous sexual offense in Utah. He stated that if the committee wanted to offer a jury instruction for judges who believe a jury makes the determination, it would be an elaborate instruction.

Ms. Jones suggested including more information in the committee note. She suggested alerting lawyers that if there is discussion about factual questions versus legal questions, the jury instruction should include options on what the lawyers should do.

Ms. Johnson stated that the committee should provide an instructive note that leaves the determination to practitioners and courts. She stated that the determination could get complicated and it is the responsibility of the court and practitioners. Ms. Jones suggested alerting practitioners to this question, but refraining from creating a specific instruction. Judge Blanch agreed.

Mr. West stated that the current committee note raises the flag and properly directs practitioners. Judge Blanch read the suggested committee note to the committee. Ms. Adams-Perlac stated that because Utah law is not clear on this, the court and practitioners could determine that this is either a factual or legal question. Ms. Johnson suggested that the committee note notify practitioners that an additional jury instruction is necessary. Ms. Jones agreed that this jury instruction does not take a position. Ms. Johnson stated that a further jury instruction would be needed whether a jury or court make the final determination. Ms. Adams-Perlac suggested adding, "Further jury instructions will be required."

Judge McCullaugh moved that the committee accept CR 1622. Ms. Johnson seconded the motion and it passed unanimously.

4. CR 1615 Aggravated Sexual Assault

Committee

Judge McCullaugh moved that the committee accept CR 1615. Professor Andrus seconded the motion and it passed unanimously.

5. SVF Aggravated Sexual Assault

Committee

Judge McCullaugh suggested removing the comma after "of, dangerous weapon" in the first option. Ms. Jones asked if the jury must find one of the options. Judge Blanch asked why the comma after "of" needs to be removed. Professor Andrus stated that both commas should be removed. Judge McCullaugh suggested adding "against."

Judge McCullaugh asked if the jury instruction addressed an enhancement or if the jury must choose factors that support the verdict. Professor Anderson asked if checking one of the boxes made it an aggravated charge. Ms. Adams-Perlac answered yes. Professor Anderson clarified that this jury instruction adds an aggravator and is not part of the elements of the underlying charge. She stated that the current instruction requires a jury to check one of the boxes. Mr. West clarified that if the jury found the defendant guilty on the verdict form and did not check a box, the verdict would be invalid. Judge Westfall asked if the instruction could include "none of the above" as a fourth option. Mr. West stated that the instruction is for an enhancement or factors that support the verdict. Judge McCullaugh stated that the defendant would be charged with "aggravated rape," and this special verdict form is taking a lesser-included instruction and adding another element to find the defendant guilty of aggravated rape. He stated that he prefers to build a verdict with the ultimate question answered after smaller questions. He asked if this was the wrong way to do it. He stated that answering bigger questions

first is not an analytical approach for juries. Ms. Adams-Perlac asked Judge McCullaugh if his suggestion included two verdict forms.

Professor Anderson asked if a person charged with “aggravated rape” would only receive one special verdict form. Ms. Johnson stated that “aggravated rape” is not a charge. Ms. Johnson explained that the “Aggravated Sexual Assault” instruction is not an enhancement. She explained that it is a different offense in the code and it does not enhance rape because it has a standalone enhancement. She stated that it would be unclear what to charge a person with if the person used a knife during the rape. She suggested that she could charge rape and aggravated assault, or rape and aggravated sexual assault, or just aggravated sexual assault. However, she explained that if the person was only charged with aggravated sexual assault and the jury found there was not a knife, a person could not be convicted of rape. Professor Anderson asked Ms. Johnson what she would charge a person with if the person used a knife during a rape. Ms. Johnson stated that it is unclear. Professor Anderson stated that “Aggravated Sexual Assault” is a different crime and should not be used with rape, object rape, forcible sodomy, or forcible sexual abuse.

Judge McCullaugh asked if the lead charge would be aggravated sexual assault with a lesser-included of rape. Ms. Johnson stated that they are different crimes, but they could be considered a lesser-included. She reiterated that “Aggravated Sexual Assault” is a standalone statute.

Ms. Jones questioned the passage of CR 1615 because it requires rape and an additional element. She stated that the elements of rape, object rape, or forcible sodomy have not been included in the instruction and all the elements must be proven for a conviction. Judge Blanch stated that he assumed the committee would create another instruction to explain each of the elements. Ms. Adams-Perlac stated that the concern is that it is not a lesser-included offense that would require an additional instruction. Ms. Jones suggested using a separate instruction for aggravated sexual assault that includes all the individual elements. Ms. Adams-Perlac suggested using brackets with a committee note about whether the elements are necessary. Ms. Jones suggested putting brackets into the body of the proposed instruction to ensure practitioners do not miss the necessary language.

Ms. Johnson suggested that this instruction is convoluted that it would be difficult for the committee to create a proper instruction. She suggested tabling the discussion. Judge Blanch suggested unapproving CR1615 pending further consideration because of the complexity.

Ms. Jones moved that the committee unapprove CR 1615 and table for further discussion. Ms. Johnson seconded the motion and it passed unanimously.

6. CR 1621 Penetration of Touching Sufficient to Constitute Offense Committee

Judge McCullaugh stated that the committee should determine the relevant element that the jury must find. Ms. Jones asked if there is a definition for penetration. Ms. Johnson stated that case law defines penetration. Ms. Jones stated that *State v. Pullman* and *State v. Simmons* define penetration. Ms. Adams-Perlac stated there is a statutory definition. She asked Mr. Petersen to create a definition. Judge Blanch stated that if penetration has the same definition for all offenses, then a definition should just be included with other instructions. Ms. Johnson clarified that the caselaw defines penetration differently for different offenses. Ms. Jones agreed.

Judge Blanch stated that the penetration distinction should be addressed in the instruction. Ms. Jones stated that the third paragraph uses “any touching.” Ms. Jones suggested clarifying that “over clothing” is not enough for penetration. Professor Andrus suggested

clarifying that touching skin is necessary. Mr. West asked if the statutory definition of “penetration” or “touching” is different depending on the offense. Judge Blanch stated that Ms. Johnson stated that the definition was different for various offenses. Professor Andrus stated that clarification was needed for the first paragraph to differentiate from the second and third paragraphs because “touching” is defined differently.

Ms. Adams-Perlac stated that she would research this issue. Professor Anderson stated that if all elements are relevant, she does not understand what “relevant element” means in this instruction. Ms. Adams-Perlac stated that it means any element that involves touching or penetration. Judge McCullaugh stated that any penetration, however slight, is enough to establish penetration. Professor Anderson stated that “relevant element” is a confusing term.

Ms. Jones suggested breaking CR1621 into two instructions for penetration and touching to avoid confusion. Professor Andrus and Professor Anderson agreed. Ms. Jones suggested separating the three paragraphs into separate instructions and include more specificity regarding skin. Ms. Adams-Perlac will revise this before the next meeting. Judge Blanch asked if the committee wanted to vote on separating the instruction.

Ms. Johnson disagreed with separating the definitional instruction of “touching” because the difference between “touching” and “penetration” depends on the crime. She suggested that one definition should be used for the specific crime instead of multiple definitions. Ms. Jones responded and stated that the committee notes should instruct attorneys to choose the definition for the crimes at issue. Ms. Johnson agreed and stated the committee note should state which definition a practitioner should use for different crimes. Judge Blanch stated that the committee will address this at the next meeting.

7. Committees

Committee

Judge Blanch stated that at the October meeting, the committee decided to use subcommittees to address drug related offenses, DUI offenses, and domestic violence offenses. He stated that the chairs of the subcommittees should approach people to join their subcommittee. He stated the committee talked about having the subcommittees identify the most frequently charged offenses to prioritize creation of instructions. He stated that if attorneys know that instructions exist, attorneys will be more likely to use them.

Judge McCullaugh stated that he has elements instructions for DUI’s and auto homicide. He stated that the committee should only create instructions based on elements of crimes and avoid instructions on field sobriety tests.

Ms. Adams-Perlac stated that Ms. Klucznik is working on the drug offenses.

8. December Meeting

Committee

Ms. Adams-Perlac stated that Judge Lindberg wants to reschedule the December 3 meeting. The committee agreed to meeting on December 10, 2014.

9. Adjourn

Committee

The meeting was adjourned at 1:12 p.m. The next meeting is Wednesday, December 10, 2014.